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BAKER et al. v. LYNCHBURG NAT. BANK et al. (No. 1).
HENRY SILVERTHORN JEWELRY CO. v. LYNCHBURG
NAT. BANK. (No. 2).

Jan. 11, 1917.

[91 S. E. 157.]

1. Banks and Banking (§ 270 (3)*)—Usury—Statute—"Payment."
—Reserving the amount of discount on a note is not a "payment" of such discount within Rev. St. U. S. § 5198 (U. S. Comp. St. 1913, § 9759), imposing penalties for usury charged by or paid to a national bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1025, 1027; Dec. Dig. § 270 (3).* 2 Va.-W. Va. Enc. Dig. 331.

For other definitions, see Words and Phrases, First and Second Series, Payment.]

2. Payment (§ 39 (2)*)—Application—Discounted Note.—Where the maker of a note discounted at a national bank makes a payment thereon, the application of which he does not direct, the bank can apply it first to the payment of the discount, without the consent of the debtor; the rule that the court will apply the payment to the principal instead of the interest applying only where no application is made by either debtor or creditor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 105, 116; Dec. Dig. § 39 (2).* 6 Va.-W. Va. Enc. Dig. 1049.]

3. Banks and Banking (§ 270 (7)*)—Payment—Remedy—Statute.
—Under Rev. St. U. S. § 5108, providing that a national bank charging a greater interest than allowed shall forfeit the entire interest and that in case the greater rate has been paid the debtor can recover back twice the amount of interest paid, usurious interest paid to the bank cannot be deducted from the principal or applied to the principal; the exclusive remedy being a recovery of the penalty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031-1034; Dec. Dig. § 270 (7).* 2 Va.-W. Va. Enc. Dig. 331.]

4. Usury (§ 16*)—Payment—Reservation.—Where the transaction is in fact a reservation of usury from the principal, a device whereby it was made to appear as a payment of a bonus will be disregarded, and the court will deal with the real transaction.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 30; Dec. Dig. § 16.* 13 Va.-W. Va. Enc. Dig. 443.]

5. Banks and Banking (§ 270 (7)*)—Usury—Payment—Reservation—Determination.—The determination of whether a payment on a usurious transaction was in fact a payment or was a reservation by the creditor which may be deducted from the principal is one of

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

fact, to be governed by all the circumstances, and while the court will be alert to look for the true nature of the transaction, it will not, by construction, find it to be a reservation merely because that was possible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031-1034; Dec. Dig. § 270 (7).* 2 Va.-W. Va. Enc. Dig. 331.]

6. Limitation of Actions (§ 59 (2)*)—Usury—Payment—Recovery—“Usurious Transaction.”—Under Rev. St. U. S. § 5198, providing that where excess interest has been paid, the debtor paying it may recover double the amount of interest paid, provided action is commenced within two years from the time the usurious transaction occurred, each actual payment of usurious interest is the “usurious transaction” from which the two-year period of limitation begins to run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 10; Dec. Dig. § 59 (2).* 9 Va.-W. Va. Enc. Dig. 390.

For other definitions, see Words and Phrases, First and Second Series, Usurious.]

7. Banks and Banking (§ 270 (9)*)—Usury—Payment—Recovery—Statute.—While under that statute double the whole amount of interest paid, legal as well as illegal, may be recovered, the payments recovered must each have been a usurious transaction.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1038, 1039; Dec. Dig. § 270 (9).* 2 Va.-W. Va. Enc. Dig. 331.]

8. Banks and Banking (§ 270 (11)*)—Usury—Penalty—Recovery—Statute.—The rules which govern actions to recover a debt, made void for usury or to recover the interest thereon, under Rev. St. U. S. § 5198, do not apply to actions under the latter part of that statute to recover the statutory penalty of double the amount paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1042-1053; Dec. Dig. § 270 (11).* 2 Va.-W. Va. Enc. Dig. 331.]

9. Banks and Banking (§ 270 (6)*)—Usury—Statutes—Remedies.—The recovery of double the interest paid to a national bank in a usurious transaction under Rev. St. U. S. § 5198, is a remedy exclusive of state statutes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1029, 1030, 1036, 1037; Dec. Dig. § 270 (6).* 2 Va.-W. Va. Enc. Dig. 331.]

10. Limitation of Actions (§ 59 (2)*)—Usury—Penalty—Limitations.—Where a bank required as a condition for discounting a note at the legal rate the payment of the debt of a third person for which the makers were not liable, thereby rendering the transaction usurious, and applied the payment, when made, to the discharge of that debt, the court cannot consider the amount thereof as a payment

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

on the principal so as to render subsequent payments of interest usurious; but, the limitation fixed by Rev. St. U. S. § 5198, having run against an action for the penalty on the payment of that debt, the maker of the note cannot recover the penalty on subsequent payments of interest.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 332; Dec. Dig. § 59 (2).* 9 Va.-W. Va. Enc. Dig. 390.]

11. Banks and Banking (§ 270 (4)*)—Usury—Penalty—Payments on Subsequent Note.—The rule that a renewal note executed after discharge of all of the usury is purged of the usury, while it does not apply to a suit by a national bank on a usurious note under Rev. St. U. S. § 5198, providing that the bank shall forfeit all interest, legal as well as usurious, does apply to an action under the latter part of the section to recover the statutory penalty of double the amount of the interest paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1026; Dec. Dig. § 270 (4).* 2 Va.-W. Va. Enc. Dig. 331.]

Appeal from Corporation Court of Lynchburg.

Separate actions by the Lynchburg National Bank against E. M. Baker and others and by Henry Silverthorn Jewelry Company against the Lynchburg National Bank. Judgment for the plaintiff in the first action and for defendant in the second action, and the defeated parties appeal. Judgments affirmed.

Amonette & Bailey and *R. C. Blackford*, all of Lynchburg, for appellants.

Wilson & Manson, of Lynchburg, for appellees.

CARY *v.* HARRIS.

Jan. 11, 1917.

[91. S. E. 166.]

1. Contracts (§ 99 (3)*)—Fraud (§ 58 (1)*)—Rescission—Burden of Proof.—A party alleging fraud must prove it by clear and convincing testimony particularly in cases involving the rescission of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 449-453, 1199; Dec. Dig. § 99 (3); Fraud, Cent. Dig. § 55; Dec. Dig. § 58 (1).* 6 Va.-W. Va. Enc. Dig. 502.]

2. Compromise and Settlement (§ 11*)—Favor of Law.—Compromise agreements are favored by the law.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 51-53; Dec. Dig. § 11.* 3 Va.-W. Va. Enc. Dig. 40.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.